UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

AMERICAN INTERNATIONAL GROUP, INC., et al., Plaintiffs, v. ACE INA HOLDINGS, INC., et al., Defendants.	Case No. 07 CV 2898 Judge Robert W. Gettleman Magistrate Judge Sidney I. Schenkier
LIBERTY MUTUAL INSURANCE COMPANY, et al., Counter-Claimants, v. AMERICAN INTERNATIONAL GROUP, INC., et al., Counter-Defendants.	
SAFECO INSURANCE COMPANY OF AMERICA and OHIO CASUALTY INSURANCE COMPANY, individually, and on behalf of a class consisting of members of the National Workers Compensation Reinsurance Pool, Plaintiffs, v. AMERICAN INTERNATIONAL GROUP, INC., et al., Defendants.	Case No. 09 CV 2026 Judge Robert W. Gettleman Magistrate Judge Sidney I. Schenkier

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SUMMARY OF MOTION

Safeco Insurance Company of America ("Safeco") and Ohio Casualty Insurance Company ("Ohio Casualty") (together, "Plaintiffs") filed this class action against American International Group, Inc. ("AIG") and various companies affiliated with AIG (the "AIG Companies") (together, "Defendants"). Plaintiffs allege that Defendants engaged in a fraudulent scheme to underreport voluntary workers compensation premium, causing Plaintiffs and other participants in the National Workers Compensation Reinsurance Pool (the "Pool") to pay an increased share of residual market losses.

Plaintiffs seek to act on behalf of a class consisting of all participants in the Pool, with the exception of the Defendants. First Amended Complaint ("Cmplt."), ¶ 1, 23. Plaintiffs now move to certify that class pursuant to Fed. R. Civ. P. 23(b)(3). That rule authorizes certification if the proposed class and its representative satisfy the requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – and if issues common to the class predominate over individual issues and a class action is superior to other methods of adjudication.

Here, all of these requirements are satisfied. The class that Plaintiffs seek to represent has more than 1,000 members. Plaintiffs' claims are based on the same law and facts as the claims of the other class members. Thus, the commonality and typicality requirements are readily met here, and common issues predominate over individual issues (which pertain solely to the amount of losses suffered by individual class members). Both Plaintiffs and their counsel will fairly and adequately represent the interests of the putative class as they have done since this action was filed. Finally, a class action is superior to any alternative method for adjudicating the claims and issues raised by this action.

RELEVANT FACTUAL BACKGROUND

The Pool was established by Articles of Agreement (the "Articles") signed by all class members and all AIG Companies to ensure that companies writing workers compensation insurance in the voluntary market could equitably apportion the premium, losses and expenses arising from the residual workers compensation insurance market. Ex. 1 at NWCRP0091788-90. The residual market is comprised of employers who have been unable to obtain workers compensation insurance in the voluntary market. Ex. 1 at NWCRP0091788. Insurance for the residual market is "assigned" to a specific insurer who must provide coverage under rates and terms specified by law. Ex. 1 at NWCRP0091789. The Pool apportions premiums and losses from the residual market by year and by state among all insurers that participate in the voluntary workers compensation insurance market in proportion to their share of the voluntary market. Ex. 1 at NWCRP0091792.

The National Council on Compensation Insurance, Inc. ("NCCI") administers this residual market loss-sharing system on behalf of, and as the contractually appointed attorney-in-fact for, the companies participating in the Pool ("Participating Companies"). Ex. 1 at NWCRP0091789. Each Participating Company is required to provide NCCI with financial reports containing premium information by state on an annual basis. Ex. 1 at NWCRP91792. NCCI then apportions residual market shares for each state that participates in the Pool among the Participating Companies based on their reported net written premium in the voluntary workers compensation market. Ex. 1 at NWCRP91790-92. [redacted] Thus, Participating Companies do not know, and are unable to verify, the accuracy of other Participating Companies' reported premiums. [redacted]

[redacted] The NCCI relies on submissions from Participating Companies pursuant to contracts that require accurate self reporting. Each member of the Pool therefore must rely entirely on the accuracy and integrity of the premium self-reporting by other Participating Companies, and each Pool member knows that all other Participating Companies likewise rely on the accuracy and integrity of its premium self-reporting. Over the years at issue, the Pool experienced billions of dollars of losses in the residual market that were allocated among the Participating Companies pursuant to this system, based on the amount of voluntary workers compensation premium that each Participating Company self-reported to NCCI. Ex. 1 at NWCRP0091792; Ex. 3.

An investigation by the Attorney General of the State of New York disclosed in 2006 that the AIG Companies had systematically and materially underreported the workers compensation premiums they wrote in the voluntary market in order to minimize their contractual share of losses sustained in the residual market. Ex. 4 at 3. Defendants accomplished this fraud by sending false premium reports to NCCI, which relied on those reports to set the loss allocations for all Participating Companies. Ex. 5. On February 22, 2007, the AIG Companies filed with the National Association of Insurance Commissioners "corrected" premium reports for the years 1987-2005. Ex. 6. In doing so, the AIG Companies effectively admitted that, during those eighteen years, they failed to report hundreds of millions of dollars in workers compensation premium that they wrote in the voluntary market that were the subject of the Pool-based residual market loss-sharing system established by the Articles.[1] *Id.*

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[1] Plaintiffs do not accept that the AIG Companies' premium underreporting for those eighteen years was limited to the amounts that they have thus far admitted, or that the premium underreporting was limited to those eighteen years. A key issue, common to the claims of Plaintiffs and the class members, will be the actual amount of the AIG Companies' premium underreporting both during the 1987-2005 period and during the other years that are the subject of the claims alleged.

The AIG Companies' admitted underreporting means it is undisputed in this case that each Plaintiff and each class member was assessed, and paid, money that should have been paid by the AIG Companies, and each carried risks of losses in the residual market that should have been borne by the AIG Companies. The amount of the losses suffered by the Plaintiffs and the class due to the AIG Companies' underreporting is not yet known, and can only be determined through the discovery process in this case. However, given the magnitude of the premium underreporting to which Defendants have to date admitted, and given the evidence indicating that Defendants' premium underreporting was purposeful (thus exposing Defendants to a damages multiplier under RICO, and to an award of punitive damages), the amount at stake in this case can be reliably estimated to be in excess of $1 billion.

On May 24, 2007, NCCI, as attorney-in-fact for the Participating Companies, filed a complaint against Defendants, Case No. 07 C 2898 (the "NCCI Action"). On January 26, 2009, Defendants moved to dismiss the NCCI Action, arguing that neither NCCI nor the Pool had standing to bring the claims that were asserted in that action. NCCI Action, Dkt. No. 408. On August 20, 2009, the Court granted that motion. Meanwhile, on April 1, 2009, Plaintiffs filed this class action.

ARGUMENT

Rule 23 "requires a two-step analysis to determine if class certification is appropriate. First, Plaintiffs must satisfy all four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Acosta v. Scott Labor LLC*, No. 05 C 2518, 2006 WL 27118, at *2 (N.D. Ill. Jan. 3, 2006) (Gettleman, J.) (*citing Harriston v. Chi. Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993)). "Second, the action must also satisfy one of the conditions of Rule 23(b)." *Id*. Because Plaintiffs seek certification under Rule 23(b)(3), they must "demonstrate that: (1) common questions . . . predominate over any questions affecting only individual members; and (2) class resolution is superior to other methods for the fair and effective adjudication of the controversy." *Id*.

Plaintiffs' motion for class certification should be granted because all requirements of Rule 23(a) and 23(b)(3) are met.

1. The Proposed Class Is Sufficiently Numerous.

Under Rule 23(a)(1), certification requires that the class be "so numerous that joinder of all members is impracticable." As AIG argued to this Court in support of the discovery that it has propounded to unnamed putative class members, there are more than 1,000 Participating Companies that populate the class that Plaintiffs seek to represent. Docket No. 129 at 6, ¶10. The numerosity requirement of Rule 23(a)(1) is therefore met. *See, e.g.*, *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (holding that generally a class of forty or more will satisfy Rule 23(a)(1)); *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 184 (N.D. Ill. 1992) (numerosity requirement "easily satisfied" by potential class consisting of over 100 members); H. Newberg & A. Conte, Newberg on Class Actions, § 3:5 at 246 (4th ed. 2002) (hereafter cited as "Newberg on Class Actions") (joinder "certainly" impracticable for class "numbering in the hundreds").

2. There Are Common Issues of Both Fact and Law.

Under Rule 23(a)(2), a plaintiff seeking to represent a class must show that "there are questions of law or fact common to the class." "A plaintiff need only show that there is at least one question of fact common to the class to satisfy the commonality requirement." *Dunn v. City of Chi.*, 231 F.R.D. 367, 372 (N.D. Ill. 2005) (Gettleman, J.) Thus, "[t]he fact that there is some factual variation among the class grievances will not defeat a class action." *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992). Instead, "[a] common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Id*. at 1018. As discussed in greater detail *infra* at p. 8-11, a multitude of common questions of both fact and law are presented here, because Defendants breached duties to all class members and damaged all class members by the same actions. Unquestionably, the claims of Plaintiffs and those of the class members share a "common nucleus of operative fact." Therefore, the commonality requirement is satisfied.

3. Plaintiffs' Claims Are Typical.

Rule 23(a)(3) requires that a plaintiff seeking to represent a class show that its claims are typical of the claims of the other class members. This inquiry "focus[es] on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *De La Fuente v. Stokely-Van Camp, Inc*., 713 F.2d 225, 232 (7th Cir. 1983). Thus, "[a] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Id*. (*quoting* H. Newberg, Newberg on Class Actions, § 1115(b) at 185 (1977)); *see also McFadden v. Bd. of Educ.*, No. 05 C 0760, 2008 WL 4877150, at *5 (N.D. Ill. Aug. 8, 2008) (Gettleman, J.) (same). Typicality therefore "look[s] to the defendant's conduct and the plaintiff's legal theory." *Rosario*, 963 F.2d at 1018.

In this case, all of the claims of Safeco and Ohio Casualty arise from Defendants' scheme to underreport premium which is "the same event or practice or course of conduct that gives rise to the claims of other class members." *De La Fuente*, 713 F.2d at 232. In addition, each of Plaintiffs' claims is based entirely on "the same legal theory" as the corresponding claim of the other class members. *Id*. The typicality requirement therefore is satisfied here.

4. Plaintiffs Are Adequate Class Representatives.

Under Rule 23(a)(4), a plaintiff seeking to represent a class must show that it "will fairly and adequately protect the interests of the class." This requirement entails a two-part inquiry. *Retired Chi. Police Ass'n v. City of Chic.*, 7 F.3d 584, 598 (7th Cir. 1993). First, a putative class representative must be represented by counsel that is qualified, experienced, and generally able to conduct the proposed litigation. *Id.*; *McFadden*, 2008 WL 4877150, at *5; Fed. R. Civ. P. 23(g); *see also* Newberg on Class Actions, § 3:21 at 408. Plaintiffs in this action are represented by the Chicago law firm of Grippo & Elden LLC and the Boston law firm of Nutter McClennen & Fish LLP. Over a dozen lawyers at these firms have, over the past twelve months, been actively involved in the representation of Plaintiffs in this case. Ex. 7 at ¶1; Ex. 8 at ¶¶1-6. Lead counsel at these firms have a combined 70 years of pertinent experience, notably in complex business cases that have included both the prosecution or defense of RICO claims arising in business contexts, the representation of insurance companies in industry litigation, and many trials. Ex. 7 at ¶¶1-5; Ex. 8 at ¶¶1-5. Both firms have exhaustively investigated the facts and law regarding the various claims that have been asserted by the Plaintiffs and the putative class in this action. Ex. 7 at ¶10; Ex. 8 at ¶9. In sum, Plaintiffs are represented by counsel that are "qualified, experienced, and generally able to conduct the litigation." Newberg on Class Actions, § 3:21 at 408.

The second component of the adequacy inquiry focuses on whether the class representatives have a "sufficient interest in the outcome to ensure vigorous advocacy." *McFadden*, 2008 WL 4877150, at *5 (*quoting Chapman v. Worldwide Asset Mgmt., LLC,* No. 04 C 7625, 2005 WL 2171168, at *4 (N.D. Ill. Aug. 30, 2005)). This requirement is satisfied where the class representatives have the same interest and suffer the same injury as the class members. *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002); *see also*

Newberg on Class Actions, § 3:23 at 414. For reasons discussed in the foregoing section on typicality, Plaintiffs have the same interest as other class members in establishing Defendants' liability and recovering damages upon the claims that they allege, and have suffered the same injury as the other class members (*i.e.*, overpayment of residual market costs). Between them, the Safeco companies and the Ohio Casualty companies reported premium from the voluntary market in each state that participated in NWCRP pools during each year from 1973 through 2008 excepting only: Hawaii in 1976, 1977 and 1992; Maine in 1974; Nebraska from 1998 through 2001; Nevada in 1997 and 1998; Rhode Island in 1977; and Vermont in 1979 and 1980. Exs. 9-10.[2] For the entire period, they reported more than $3 billion in workers compensation premium in the voluntary market. *Id.* Thus, Plaintiffs extensively participated in the Pool for many years.

If Plaintiffs prevail upon their claims, each class member will benefit proportionally to the extent of its participation in the affected market during the relevant period. Plaintiffs and the class members thus share a common and overriding interest in the successful prosecution of the claims alleged. There being no "antagonistic or conflicting claims" that would prevent them from adequately representing the interests of the class, *Rosario*, 963 F.2d at 1018, Plaintiffs have a "sufficient interest in the outcome to ensure vigorous advocacy." *McFadden*, 2008 WL 4877150, at *5. Indeed, Plaintiffs have proven through their prosecution of this case over the last year that they will vigorously pursue the interests of the class. Therefore, Plaintiffs are fair and adequate representatives of the proposed class. *See also* Exs. 12-13.

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[2] *See also* Ex. 11 (NWCRP0012216 - NWCRP0015038). Based on discovery to date, Plaintiffs understand that this document shows each Participating Company's participation ratio in each NWCRP pool starting in 1973.

5. Common Issues Predominate.

Under Rule 23(b)(3), a plaintiff seeking certification of a class must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." This provision of Rule 23(b)(3) "requires the Court to inquire how the case will be tried. . . . This entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class." *Randolph v. Crown Asset Mgmt., LLC*, 254 F.R.D. 513, 519 (N.D. Ill. 2008) (quotations and citations omitted). The predominance test typically is met "where a defendant is alleged to have acted wrongfully in the same basic manner towards an entire class." *Id*. at 520 (*quoting P.J.'s Concrete Pumping Serv., Inc. v. Nextel West Corp.*, 803 N.E.2d 1020, 1029 (Ill. App. Ct. 2004)).

Because the Plaintiffs and the other members of the class they seek to represent are all parties to the Articles that are the subject of the breach of contract claim and are all alleging the same non-contract claims,[3] and all of their claims are based on exactly the same facts (excepting only the issue of the amount of damages suffered by each class member), the trial in this case will consist almost entirely of common issues. Issues common to the claims of Plaintiffs and all other class members that will predominate include the following:

[3] AIG previously argued that the state law claims against it in the NCCI Action, which are substantially the same as the state claims asserted here, were entirely governed by New York law. NCCI Action, Docket No. 39 at 8. *See also* Ex. 14 at 1-2; Ex. 15 at 1-2; Ex. 16 at Art. IV. 1-2; Ex. 17 at 220-221. In moving to dismiss Plaintiffs state claims in this action, AIG again invoked New York law as applying to those claims, but qualified that invocation as purportedly being solely for purposes of its dismissal motion, alluding vaguely to the possibility that the law of some other state might apply to one or more of those claims for other purposes. For the reasons described in Plaintiffs' brief in response to AIG's motion to dismiss, Plaintiffs believe that AIG was initially correct in conceding the application of New York law to Plaintiffs' state law claims. Should AIG, in opposing Plaintiffs' Motion for Class Certification, argue that some other state's law that it regards as more accommodating to its opposition arguments should apply to Plaintiffs' state law claims, Plaintiffs will address whatever specific argument AIG might raise in their reply memorandum.

- The amount by which the AIG Companies inaccurately reported the written premiums by year and by state in the voluntary market [material to liability and damages issues upon the breach of contract and all other claims alleged by Plaintiffs and all class members];

- Whether the AIG Companies, C.V. Starr & Co., Inc. ("CVSCO") and Starr International Company, Inc. ("SICO"), constituted an association-in-fact enterprise within the meaning of RICO, a fact-intensive inquiry that will examine the complex relationship between these entities over a period spanning more than three decades [material to liability issues upon the RICO claims alleged by Plaintiffs and all class members];

- Whether and to what extent AIG conducted or participated in the conduct of the enterprise consisting of the AIG Companies, CVSCO and Starr through the use of asset transfers from CVSCO and/or Starr to persons who conducted the business of the AIG Companies [material to liability issues upon the RICO claims alleged by Plaintiffs and all class members];

- Whether and to what extent any Defendant engaged in a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961, including the extent to which predicate acts of mail fraud and wire fraud were committed by sending false premium reports to NCCI [material to liability issues upon the RICO claims alleged by Plaintiffs and all class members];

- Whether Defendants knew that the AIG Companies underreported the premium that they wrote in the voluntary market [material to liability issues upon the common law fraud and RICO claims alleged by Plaintiffs and all class members];

- The materiality of any misrepresentations made by the AIG Companies as to the premium that they wrote in the voluntary market [material to liability issues upon the common law fraud claim alleged by Plaintiffs and all class members];

- Whether NCCI acted as the agent for Plaintiffs and all class members in relying upon the premium data provided to it by the AIG Companies in calculating the residual market obligations of other Participating Companies [material to liability issues upon the common law fraud claim alleged by Plaintiffs and all class members];

- Whether and to what extent Defendants engaged in gross, wanton, or willful fraud or other morally culpable conduct to an extreme degree [material to the availability of a punitive damages award upon the fraud claim alleged by Plaintiffs and all class members];

- Whether and to what extent Defendants' conduct was directed against the public generally [material upon an alternative theory to the availability of a punitive damages award upon the fraud claim alleged by Plaintiffs and all class members]; and

- The extent to which AIG was enriched by having underreported the premium that the AIG Companies wrote in the voluntary market [material to liability issues upon the unjust enrichment claim alleged by Plaintiffs and all class members].

These common issues of law and fact plainly predominate over any individual issues in this case.[4]

6. A Class Action Is a Superior Method of Adjudication.

Under Rule 23(b)(3), a plaintiff seeking certification of a class must also show "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Typically, the "other available method" for adjudicating class actions are individual suits by class members in which the claims of each are litigated separately. However, given the size and complexity of this case, it is unlikely that individual class members would be willing to spend the many millions of dollars that would be required to prosecute their individual claims against Defendants unless their individual recoveries would be substantial enough to justify such costs and attendant risks. The individual recoveries of most, if not all, individual Participating Companies are unlikely to meet that threshold amount, even though the damages of the class in the

[4] The only issue that will be unique to individual class members will be the amount of loss suffered by each as the result of Defendants' premium underreporting. That amount is a mathematical function of the voluntary workers compensation premium that each class member wrote, by year and by state. The presence of individual issues regarding the amount of damages suffered by various class members does not detract from the predominance of common issues for purposes of class certification. *Beale v. EdgeMark Fin. Corp.*, 164 F.R.D. 649, 658 (N.D. Ill. 1995) ("the need to calculate individual damages has not been held to bar a class action"); *De La Fuente*, 713 F.2d at 233 ("It is very common for Rule 23(b)(3) class actions to involve differing damage awards for different class members"); *Portis v. City of Chi.*, No. 02 C 3139, 2003 WL 22078279, at *4 (N.D. Ill. Sep. 8, 2003) (Gettleman, J.) ("the possibility of individualized damage inquiries does not defeat class certification") (citations and quotations omitted). *See also* Fed. R. Civ. P. 23(b)(3) Advisory Committee Notes ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of damages suffered by individuals within the class.").

aggregate are substantial. Consequently, individual suits are not, as a practical matter, an available method for adjudicating the issues implicated by this action. "Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006); *see also Scholes v. Moore*, 150 F.R.D. 133, 138 (N.D. Ill. 1993) (class action superior method for adjudicating controversy where "[n]ot every claimant sustained such large damages that he or she could pursue his or her own action"); *Kohen v. Pac. Inv. Mgmt. Co.*, 244 F.R.D. 469, 481 (N.D. Ill. 2007) (class action superior method for adjudication where it "permit[ed] pooled claims that otherwise would be uneconomical to litigate individually to have their day in court.") A class action therefore is a superior method for adjudicating the parties' controversy.

But even assuming, for sake of argument, that individual suits by each class member were an available method for adjudicating the controversy over Defendants' liability to the Plaintiffs and the other class members, a single class action that resolved the factual and legal issues raised by Defendants' underreporting still would be a far superior method of adjudication. A series of hundreds of individual actions in which the same issues of law and fact would be re-litigated would result in an extraordinary waste of resources by the parties and the judicial system. For this reason, class actions are generally considered to be a superior means of litigation where common issues predominate. *Dunn*, 231 F.R.D. at 378; *Cicilline v. Jewel Food Stores, Inc*., 542 F. Supp. 2d 831, 839-40 (N.D. Ill. 2008); *Robledo v. City of Chi.*, 444 F. Supp. 2d 895, 908 (N.D. Ill. 2006). Where, as here, there are more than 1,000 members of the class as to which certification is sought, these efficiency concerns typically compel the conclusion that a class action is a superior method for adjudicating the controversy. *Kohen*, 244 F.R.D. at 481.

In sum, the requirement of Rule 23(b)(3) is met in this case whether or not there is an "other available method" for adjudicating the controversy. Moreover, there is no reason to foresee any difficulty in managing this case as a class action. The identity of class members easily can be determined, because all are (or were) parties to the Articles. Any individual Participating Company that would prefer to maintain a separate action can easily opt-out and do so. Any class member that wishes to intervene can do so. For these reasons, a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that their Motion for Class Certification should be granted, and the Court should certify a class under Rule 23(b)(3) consisting of all participants in the Pool, with the exception of Defendants.

Dated: July 16, 2010

Respectfully submitted,

SAFECO INSURANCE COMPANY OF AMERICA and OHIO CASUALTY INSURANCE COMPANY

By: /s/ Gary M. Elden
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on July 16, 2010, I caused a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION** to be filed with the Clerk of the Court and served using the CM/ECF e-filing system upon all counsel of record.

s/ Gary M. Elden
Gary M. Elden